Supreme Court, U.S.
FILED

09-880 DEC 29 2009

OFFICE OF THE CLERK

No. _____

In THE

Supreme Court of The United States

CHARLES W. BIRKS,
Petitioner, *pro se,*

v.

KEITH F. PARK, Esquire ; COUGHLIN STOIA GELLER RUDMAN & ROBBINS, LLP ; REGENTS OF THE UNIVERSITY OF CALIFORNIA,
Respondents.

On Petition for Writ of Certiorari
to The U.S. Court of Appeals
for the Fifth Circuit

Request for Notice, Application, and Protection of Statute Law

Prepared by litigant, *pro se* :
Charles W. Birks
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Walton, West Virginia 25286
Telephone No. 304-577-6610

Questions Presented for Review

Question 1 : Is a statute law, itself, recognizably needed as evidence that such law was actually violated?

Question 2 : Do Supreme Court bright-line rules or tests conclude that for lower courts to consider a law in evidence, a court must first recognize that a law provision exists?

Question 3 : Is "Judicial Notice" described in Federal Rules of Evidence, as was requested, mandatory on the lower courts, including the U.S. Court of Appeals for the Fifth Circuit ? Would that include an application of law-cites recognizably produced as evidence of law violations for the delivery of Substantive Due Process?

Question 4 : Does the cited Private Securities Litigation Reform Act (PSLRA) law provision at §78u- 4(a)(4) describe that courts can not exercise their authority or discretion over class-action settlement to allow "any" unshared settlement-consideration to be granted to a Lead Plaintiff ?

Question 5 : In light of Question 4 can a Lead Plaintiff through Lead Counsel lawfully negotiate for any settlement-consideration that is first, not

to be shared with the class and second, impermissible for a court to allow? Does such negotiation impact the class' timely opportunity for fair representation and, so, recovery of loss?

Question 6 : In light of question 5, is such negotiation and subsequent acceptance a fair representation meeting the spirit, willing to serve as representative[s] for the class, within the Sworn Certificate required by the PSLRA at §78u-4(a)(2)(A)? Especially §78u-4(a)(2)(A)(iii) and (vi)?

Question 7 : In view of the court's of the Fifth Circuit refusal to Notice and apply the cited law to this case, is the U.S. Court of Appeals for the Fifth Circuit Mandate for levy of the costs of the defense from Petitioner other than "a taking of private property without Due Process of law" ?

Question 8 : Do PSLRA violations, as cited, create an independent, civil cause-of-action when class-representatives depart from service on behalf of a class toward the Lead Plaintiff's self-interest? Can such cause-of-action be properly-made when limited against only those beneficiaries of the violations and not to thereby include the erred court presiding over a flawed settlement or by a seeking to overturn the finality of a settlement?

Corporate Disclosure Statement

Petitioner makes the following disclosure :

1. Is party a publicly held corporation or other publicly held entity? NO
2. Does party have any parent corporations? NO
If yes, identify all parent corporations, including grandparent and great-grandparent corporations.
3. Is 10% or more of the stock of a party owned by a publicly held corporation or other publicly held entity? NO
If yes, identify all such owners.
4. Is party a trade association? NO
If yes, identify any publicly held member whose stock or equity value could be affected substantially by the outcome of the proceeding or whose claims the trade association is pursuing in a representative capacity, or state that there is no such member.
5. Does this case arise out of a bankruptcy proceeding? NO
If yes, identify any trustee and the members of any creditors 'committee.

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1. Guardian T & D Co. v. Fisher, found at Page 68-69 in 200 U.S. 57 (1906), Justice Brewer quoting from Osborne v. Morgan, (1881) 130 Mass. 102 at page 104 :

"An individual may be under no obligation to do a particular thing and his failure to act creates no liability, but if he voluntarily attempts to act and do the particular thing, he comes under an implied obligation in respect to the manner in which he does it."

2. Kokkonen v. Guardian Life Insurance Co. of America, found at page 377 in 511 U.S. 375 (1994) :

"Federal courts are courts of limited jurisdiction. They possess only that power authorized by constitution and statute ... which is not to be expanded by judicial decree ... It is to be presumed that a cause lies outside this limited jurisdiction."

3. New York Times v. United States, at page 744 in 403 U.S. 713 (1971) :

"It is a traditional axiom of equity that a court of equity will not do a useless thing, just as it is a traditional axiom that equity will not enjoin the commission of a crime. *See* Z. Chafee & E. Re, Equity 935-954 (5th ed.1967);1 H. Joyce, Injunctions §§ 580a (1909)."

4. Owen v. City of Independence, at page 657 in 445 U.S. 622 (1980) :

"The offending official, so long as he conducts himself in good faith, may go about his business secure in the knowledge that a qualified immunity will protect him from personal liability for damages that are more appropriately chargeable to the populace as a whole. And the public will be forced to bear only the costs of injury inflicted by the "execution of a government's policy or custom, whether made by its lawmakers or by those whose edicts or acts may fairly be said to represent official policy. "

Citation List of Opinions and Orders to the Case

1. 11/21/2007 - Standing Order In Re : Assignment And Referral Of Civil Actions To Magistrate Judges

2. 5/07/2008 - Notice And Order

3. 5/08/2008 - Order Vacating That Notice And Order of 5/07/2008

4. 7/08/2008 - Proposed Findings And Recommendations

5. 7/25/2008 - Order Directing Reassignment Of The Civil Action To Another Judicial Officer Of The District

6. 7/29/2008 - Clerk's Order Reassigning The Civil Action From Judge Copenhaver To Judge Goodwin

7. 8/19/2008 - Memorandum And Order

8. 9/02/2008 - Order Denying Plaintiff's Motion To Reconsider

9. 9/08/2008 - Order Of Pretrial Conference Of The Texas U.S. District Court

10. 9/08/2008 - Order To Disclose Interested Persons

11. 9/10/2008 - Order Concerning Removal

12. 9/25/2008 - Memorandum and Order

13. 10/15/2008 - Order Granting Motion To Transfer Case To Judge Lake

14. 11/17/2008 - Order Denying Plaintiff's Motion To Stay Pending Appeal To The 4th Circuit Court

15. 1/20/2009 - Judgment Of The 4th Circuit Court As DISMISSED Plaintiff's Appeal

16. 1/20/2009 - Per Curiam Opinion Supporting Dismissal Of Plaintiff's Appeal

17. 2/12/2009 - Memorandum Opinion And Order Granting Defendants' Motion For Judgment

18. 2/12/2009 - Final Judgment Dismissing Plaintiff's Texas Court Action With Prejudice

19. 3/03/2009 - Order Of The Clerk As Denied Plaintiff's Petition For Rehearing En Banc In The 4th Circuit Court

20. August 27, 2009 Per Curiam Opinion of the 5th Circuit Court as Affirmed the Texas District Court dismissal.

21. September 30, 2009 Order of the 5th Circuit Court as Denied both Rehearing and Rehearing En Banc petitions.

22. October 5, 2009 Order of the U.S. Supreme Court as Denied petition for writ of mandamus and/or prohibition (docket no. 08-1549).

Jurisdiction Statement

Plaintiff makes this Petition in exercise of this court's appellate jurisdiction by authority of Supreme Court Rule 13 and by Statute authority following in a line from U.S. District Court, Southern District of Texas, Houston Division (Texas Court) by exercise of 28 U.S.C. 1294(1) to U.S. Court of Appeals for The Fifth Circuit (5th Circuit Court) and from a U.S. Court of Appeals by exercise of 28 U.S.C. 1651(a) and possibly (b) to this Supreme Court of The United States.

Because of the nature of the 5th Circuit Court Appeal, as contested the ongoing misinterpretation of the case actually made and the numerous mis-conclusions resultant from U.S. District Court failure to make Judicial Notice of statute law in the Private Securities Litigation Reform Act, no other court than this Supreme Court could correct the foul-up created after the 5th Circuit Court, likewise, would not acknowledge or apply the law.

The matter of Supreme Court Rule 10 defines the unlikelyhood of a case made for lower-court misapplication of the law succeeding. In this case, the law was refused recognition of its existence.

The failure by the 5th Circuit Court in application of law provisions specifically created to reform the types of outrageous behaviors described in this case has created exceptional circumstances warranting exercise of this court's discretionary powers. The "recycling" of the electronic record (Appendix A-5) may confound this process.

Appeal in the 5th Circuit Court (docket no. 09-20106) was filed May 5, 2009 and decided August 27, 2009. The subsequently filed petitions for Rehearing and Rehearing En Banc were each DENIED on September 30, 2009. The 90 calendar-day period pertinent to this Supreme Court Petition indicates it is due in the mail system for 3-day delivery by December 29, 2009 (S. CT. R. 29).

The Complaint and Case pursued by the non-lawyer, *pro se* plaintiff-petitioner has always been about the "Federal Nature of The Claim" of a violation of existing Federal Law (identified as PSLRA) as based on Federal Rules of Civil Procedure Rule 11(b)(2) :

> "(2) the claims, defenses, and other legal contentions are warranted by existing law or by a nonfrivolous argument for extending, modifying, or reversing existing law or for establishing new law;".

Cites to Constitutional Provisions, Statutes, and Regulations Involved in the Case

1. 28 U.S.C. 1294(1) : Cited page 4

"Except as provided in sections 1292(c), 1292(d), and 1295 of this title, appeals from reviewable decisions of the district and territorial courts shall be taken to the courts of appeals as follows:

(1) From a district court of the United States to the court of appeals for the circuit embracing the district;"

2. 28 U.S.C. 1651 : Cited page 4

"(a) The Supreme Court and all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law.

(b) An alternative writ or rule nisi may be issued by a justice or judge of a court which has jurisdiction."

3. PSLRA §78u-4(a)(2)(A) : Cited page 13

"(2) Certification filed with complaint

(A) In general

Each plaintiff seeking to serve as a representative party on behalf of a class shall provide a sworn certification, which shall be personally signed by such

plaintiff and filed with the complaint, that-

(i) states that the plaintiff has reviewed the complaint and authorized its filing;

(ii) states that the plaintiff did not purchase the security that is the subject of the complaint at the direction of plaintiff's counsel or in order to participate in any private action arising under this chapter;

(iii) states that the plaintiff is willing to serve as a representative party on behalf of a class, including providing testimony at deposition and trial, if necessary;

(iv) sets forth all of the transactions of the plaintiff in the security that is the subject of the complaint during the class period specified in the complaint;

(v) identifies any other action under this chapter, filed during the 3-year period preceding the date on which the certification is signed by the plaintiff, in which the plaintiff has sought to serve as a representative party on behalf of a class; and

(vi) states that the plaintiff will not accept any payment for serving as a representative party on behalf of a class beyond the plaintiff's pro rata share of any recovery, except as ordered or approved by the court in accordance with paragraph (4)."

4. Particularly - §78u-4(a)(2)(A)(iii) : Cited page 14

> "(iii) states that the plaintiff is willing to serve as a representative party on behalf of a class, including providing testimony at deposition and trial, if necessary;"

5. Particularly - §78u-4(a)(2)(A)(vi) : Cited page 14

> "(vi) states that the plaintiff will not accept any payment for serving as a representative party on behalf of a class beyond the plaintiff's pro rata share of any recovery, except as ordered or approved by the court in accordance with paragraph (4)."

6. PSLRA §78u-4(a)(4) : Cited page 13

> "(4) Recovery by plaintiffs
>
> The share of any final judgment or of any settlement that is awarded to a representative party serving on behalf of a class shall be equal, on a per share basis, to the portion of the final judgment or settlement awarded to all other members of the class. Nothing in this paragraph shall be construed to limit the award of reasonable costs and expenses (including lost wages) directly relating to the representation of the class to any representative party serving on behalf of a class."

7. Federal Rules of Civil Procedure Rule 9(b) :
Cited page 16

"(b) Fraud or Mistake; Condition of Mind.
In alleging fraud or mistake, a party must state with particularity the circumstances constituting fraud or mistake. Malice, intent, knowledge, and other conditions of a person's mind may be alleged generally."

8. Federal Rules of Civil Procedure Rule 11(b)(2) :
Cited page 5

"(2) the claims, defenses, and other legal contentions are warranted by existing law or by a nonfrivolous argument for extending, modifying, or reversing existing law or for establishing new law;"

9. Federal Rules of Civil Procedure Rule 11(b)(3) :
Cited page 16

"(3) the factual contentions have evidentiary support or, if specifically so identified, will likely have evidentiary support after a reasonable opportunity for further investigation or discovery; and"

10. Federal Rules of Civil Procedure Rule 11(c)(3) :
Cited page 16

"(3) On the Court's Initiative.
On its own, the court may order an attorney, law firm, or party to show cause why conduct specifically described in the order has not violated Rule 11(b)."

11. Federal Rules of Civil Procedure Rule 11(c)(4) :
Cited page 16

"(4) Nature of a Sanction.
A sanction imposed under this rule must be limited to what suffices to deter repetition of the conduct or comparable conduct by others similarly situated. The sanction may include nonmonetary directives; an order to pay a penalty into court; or, if imposed on motion and warranted for effective deterrence, an order directing payment to the movant of part or all of the reasonable attorney's fees and other expenses directly resulting from the violation."

12. Federal Rules of Civil Procedure Rule 23(a)(4) :
Cited page 13

"(4) the representative parties will fairly and adequately protect the interests of the class."

13. Federal Rules of Evidence Rule 201(b) :
Cited page 16

Rule 201. Judicial Notice of Adjudicative Facts

(b) Kinds of facts.

A judicially noticed fact must be one not subject to reasonable dispute in that it is either (1) generally known within the territorial jurisdiction of the trial court or (2) capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned.

13. Federal Rules of Evidence Rule 201(d) :

Cited page 16

(d) When mandatory.

A court shall take judicial notice if requested by a party and supplied with the necessary information.

14. Federal Rules of Evidence Rule 1101(a) :

Cited page 16

Rule 1101. Applicability of Rules

(a) Courts and judges.

These rules apply to the United States district courts, the District Court of Guam, the District Court of the Virgin Islands, the District Court for the Northern Mariana Islands, the United States courts of appeals, the United States Claims Court, and to the United States bankruptcy judges and United States magistrate judges, in the actions, cases, and proceedings and to the extent hereinafter set forth. The terms "judge" and "court" in these rules include United States bankruptcy judges and United States magistrate judges.

Statement of the Case

Within the Dynegy Securities Litigation, a class-action, a 2005 settlement of class claims was presided over by a court of the U.S. District Court Southern District of Texas, Houston Division (Texas Court), a number of anomalies exist which are shown to be violations of federal law. The court-appointed class-representatives were these Defendants/Appellees. Petitioner was a class-member.

As part of the consideration which induced Lead Plaintiff (Regents) to settle the litigation was agreement that two positions on the Dynegy Board of Directors would be filled with nominees selected by the Regents and two specifically accepted onto the Board by Dynegy. That power and control was not time-limited. That power and control merged the interests of the Regents with the interests of the Dynegy Corporation and was against the interests of the class. That power and control consideration was not published to the class and was only found within the Settlement Stipulation, a document encrypted by the court's use of proprietary software (as required technology access, for viewing, and the acceptance of End User License Agreement from Adobe Systems specifically agreeing to potential computer system dysfunctions). The court's use of that technology was not objected by class-representatives.

It was unreasonable to conceal the terms of the settlement from the class. It was unreasonable to require acceptance of dysfunctional software. It was unreasonable to expect the class to read the

remote stipulation approved by the Texas Court with an eye toward discovery of unlawful actions by either the court or class-representatives. Because that settlement was not timely discovered as flawed, it passed into finality. This case is not made against the settlement or the presiding Texas Court. This case is made against the unlawful behaviors of the Defendants who benefitted from the law's violation in different ways.

The Private Securities Litigation Reform Act (PSLRA) at §78u-4(a)(4) precisely forbids court discretion from granting "any settlement" (consideration) which is not shared pro-rata (per share basis) with the class. Such defines "fairness" in reformed class-action law, and, by limiting court discretion, supercedes a court pronouncement of fairness under Federal Rules of Civil Procedure Rule 23 (specifically 23(a)(4)).

The conflict-of-interest is fraud. The conflict-of-interest was first engaged within class-representatives' negotiation for unshared control over Board of Director's Seats. That negotiation used valuable class-time that was to be spent seeking equitable recovery for the entire class. A negotiation for additional and unshared consideration is both unfair and, as shown, unlawful.

In PSLRA at §78u-4(a)(2)(A) is the requirement of Sworn Certificate as a public assurance that the reformed law and its provisions would be honored by the would-be Lead Plaintiff Regents. The Lead Counsel is likewise bound by the Regents'

certification to represent the class because that legal representation is directed by Lead Plaintiff.

Within those provisions at §78u-4(a)(2)(A)(iii) is agreement of "willing[ness] to serve as a representative party on behalf of a class". Such representation necessarily must be "fair" to be of service to the class.

Within those provisions at §78u-4(a)(2)(A)(vi) is agreement "plaintiff will not accept any payment for serving as a representative party on behalf of a class beyond the plaintiff's pro rata share of any recovery,". Acceptance of unshared consideration to valuable power and control, specifically outside the court's discretion to even grant, is a form of payment of a valuable consideration. Such representation is necessarily unlawful.

Such class-representation as was committed through various behavioral anomalies in actions within the Dynegy Securities Litigation settlement are behaviors of fraud and malpractice as alleged.

The negotiation and acceptance of the settlement on terms that granted benefit to the power and control over two positions on the Dynegy Board of Director's is admitted by Defendants. Petitioner had calculated the value of those Seats for the courts at 339 Million Dollars.

Petitioner maintains such value induced settlement to occur, caused the unfair and unlawful merging of interests against the class' interests, and reduced the shared-portion of recovery for the class.

Direct Argument Supporting Grant of The Writ or Final Judgment

With regard to the items of the Table of Authorities of this petition :

1. The cite shows : Because Defendants volunteered to be class-representatives, they are responsible for the consequences of the manner in which the duty was performed.

2. The cite shows : Because the PSLRA precisely prohibits the Texas Court discretion to make grant of any unshared settlement consideration, any judicial ambition to authority to expand that court's powers would have been objected by class-representatives had a self-interest not interfered with the class' interests.

3. The cite shows : It was not for the Texas Court to prevent these Defendants from breaking the law and being responsible for the consequences.

4. The cite shows : A vague similarity exists between public servant responsibility for which tested law procedure applies and the untested actions of class-representatives serving the public interest ; logically, the treatment under law should be similar. The Regents are Public Officials because The University of California is a Constitutionally Chartered arm of the State of California government ; and, as shown, acting in bad faith in the performance of class-representation. The suggestion is that The Regents may have personal liability for their actions.

The case as actually made from the beginning remains unaddressed by the federal courts by vexatious mis-conclusion of the case as an attack on settlement finality despite Petitioner's best efforts to re-direct the perception of the complaint. The cited PSLRA provisions have been completely ignored by courts within the Fifth Circuit.

The Federal Rules of Civil Procedure Rule 9(b) basis for Texas Court Dismissal of the case is absolutely specious and self-serving. The U.S. Court of Appeals for the Fifth Circuit's failure to overturn the Texas District Court is appalling.

Both the Texas District Court and Courts of Appeals of the Fifth Circuit are well-short of delivery of Substantive Due Process by refusal to make requested Judicial Notice of the cited PSLRA law as a Federal Rules of Evidence Rule 201(b) "adjudicative fact" as is mandatory by request of any party under Federal Rules of Evidence Rule 201(d) on the lower courts (inc. U.S. courts of appeal via Federal Rules of Evidence Rule 1101(a)). The law, itself, is necessarily required evidence of a law's violation and not to be ignored.

Petitioner invited the Courts of the Fifth Circuit to make a Federal Rules of Civil Procedure Rule 11(c)(4) sanction under Rule 11(c)(3) for violation of 11(b)(3). The 11(b)(3) violation occurred when Defendants furnished a false claimant-loss pool-size estimate to the Texas District Court. That estimate skewed the apparently recovered per-share-amounts as negotiated and published to the class by effecting the individual-claims calculation (in the Settlement Notice) as was designed to give

recovery advantage to certain share-purchase and share-sale dates. The estimate aided concealment from the class of what was actually negotiated via the distraction of an apparently equitable recovery. Defendants admit responsibility for the estimate.

Additionally, the mere presence of the convicted, class-action attorney, William Lerach, as Senior Partner of the law firm appointed Lead Counsel in the Dynegy Litigation (here as a Defendant), in hindsight, taints the 2005 settlement with all forms of potential corruption. The name of the Defendant law firm was changed in 2007 to the present Coughlin Stoia Geller Rudman & Robbins, LLP designation from Lerach Coughlin Stoia Geller Rudman & Robbins, LLP after Lerach plead guilty to some sort of kick-back scheme within a class-action. The defense premise offered to this case, that Defendant law firm had no financial incentive to settle the Dynegy Litigation for a reduced recovered-Dollar-amount, is rendered not credible in the wake of schemers like Lerach.

If the reform law of the PSLRA is to be ignored, it must be struck-down as unenforceable by this court in order to prevent others from making a case like this one. Because the cited law-provisions address a flaw of human nature, to shift allegiance for purposes of advantage and gain, the law is seen by Congress and The Executive to fill-a-gap between the perceptions of honest men and those of would-be thieves in order to prevent class-action conflicts-of-interest from first evolving.

What Is Sought From This Court

The cited law provisions offer relief, if only they can be applied in the courts.

If the genie is to be put-back in the bottle, this court must deal with such law violations and behaviors , harshly.

This Supreme Court's clear and fundamental understandings of the methodology of corruption, in order to unravel and resolve the law violations and hidden agendas at the center of this controversy, are vitally necessary.

Oral argument is not recognized by Petitioner to be necessary because after the fluff is wiped-off, the case is extraordinarily simple to understand from the briefs. Petitioner, of course, will submit to court procedures, as necessary.

Of resolutions in recovery for this Petitioner, various solutions and Dollar amounts have been put-forward. The sum of $75,000, as a direct loss, was agreed to be in controversy by the West Virginia Federal Magistrate Judge who first made determinations to this case. The Magistrate Findings and Recommendations were approved by the Chief District Judge, supervising. The costs of making the case to this point are beyond mere award of reasonable self-attorney fees and the court fees incurred. The vexatious and arbitrary proceedings of the case by the various federal courts has injured *pro se* Petitioner's health.

For this court to see-to-it that such Defendant behaviors are truly discouraged from class-action practice, Petitioner maintains a high-monetary award is necessary and he promises to be philanthropic with the excess. To actually share equally with Petitioner, the unshared benefit Defendant Regents gained in the Dynegy settlement had been previously calculated (and mentioned at page 42 in this Petitioner's Petition for Extraordinary Writ (Denied by this court October 5, 2009)) on a proportional-basis of value as minimally $424,000.00. That additional sum is not an extravagant or inappropriate forced-sharing of the Regents' prize.

In regard to Defendant law firm malpractice, only this court can fairly weigh the valuation of provisional award against the contributory characteristics within the law violations and gummed-up settlement caused by the law firm's behaviors and appointment as Lead Counsel for the class.

Conclusion

Class-representatives can not be permitted to negotiate and conceal self-serving benefits that courts are by law not allowed to grant them. To continue to do so, is corruptive, distracts from representative duty, and absorbs other people's time and resource, including the time of the higher courts.

Charles W. Birks 12/28/2009

Signature of Petitioner, *pro se* date

Charles W. Birks
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Walton, WV 25286
304-577-6610

Appendix

A-1. 5th Circuit Court of Appeals per curiam opinion of August 27, 2009 as AFFIRMED District Court Dismissal :

IN THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 09-20106
Summary Calendar

United States Court of Appeals Fifth Circuit
FILED
August 27, 2009
Charles R. Fulbruge III Clerk

CHARLES W BIRKS,

Plaintiff - Appellant

v .

KEITH F. PARK, Esquire; COUGHLIN STOIA GELLER RUDMAN & ROBBINS LLP; REGENTS OF THE UNIVERSITY OF CALIFORNIA

Defendants - Appellees.

Appeal from the United States District Court for the Southern District of Texas, Houston
USDC No. 4:08-CV-2702

Before JOLLY, WIENER, and ELROD, Circuit Judges.

PER CURIAM:*

Charles W. Birks invested in Dynegy, Inc. securities and was a class member in a securities class action filed in 2002 in the Southern District of Texas. Appellee, The Regents of the University of California, was appointed Lead Plaintiff for the class; appellee, Coughlin Stoia Geller Rudman & Robbins LLP was appointed Lead Counsel for the class; and appellee, Keith Park, was

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* Pursuant to 5TH CIR. R. 47.5, the court has determined that the opinion should not be published and is not precedent except under the limited circumstances set forth in 5TH CIR. R. 47.5.4.

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one of the attorneys at the Coughlin firm. The class action was settled in 2005. Birks received approximately $15,000 in settlement of his claim for losses which was calculated at approximately $71,000.

After receiving and accepting his share of the settlement funds, Birks filed this suit against the appellees in federal court in West Virginia, asserting claims for malpractice and fraud. Birks alleged in his complaint that the settlement notice, which had been approved by the Texas court, was inadequate because it failed to disclose that the settlement fund would be inadequate to

compensate fully all claimants and failed to disclose the corporate governance provisions the settlement, pursuant to which The Regents were given the right to nominate two members of Dynegy's Board of Directors. The West Virginia district court transferred Birks's action to the Southern District of Texas.

Judge Lake, who approved the Dynegy class action settlement, granted the appellees' motion for judgment on the pleadings under Federal Rule of Civil Procedure 12(c). The district court held that it had jurisdiction pursuant to the continuing jurisdiction provision of the final judgment entered in the Dynegy Securities Litigation, because Birks's claims - that the Lead Plaintiff and Lead Counsel in the Dynegy Securities Litigation sent out a deficient notice of the proposed settlement to the class members and agreed to a settlement that was unfair - would require the court to rule on matters it had previously ruled on in the final judgment approving the class action settlement. In a thorough and well-reasoned opinion, the district court examined Birks's allegations in detail, and concluded that his complaint failed to allege any facts that, if true, were capable of showing that the appellees engaged in any conduct that constituted malpractice and/or fraud in settling the Dynegy Securities Litigation.

We have reviewed the record and the arguments of the parties, and we conclude that the district court did not err in granting the appellees' motion for judgment on the pleadings. Accordingly, we affirm, essentially for the reasons stated in the district court's opinion. Birks v. Park, No. H-08-2702 (S.D. Tex. Feb. 12, 2009).

AFFIRMED.

A-2. 5th Circuit Court of Appeals Order as DENIED both Rehearing and Rehearing En Banc :

IN THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 09-20106

U. S. COURT OF APPEALS
F I L E D
Sep 30 2009
Charles R. Fulbruge III
Clerk

CHARLES W BIRKS,

Plaintiff - Appellant

versus

KEITH F. PARK Esquire; COUGHLIN STOIA GELLER RUDMAN & ROBBINS LLP; Regents OF THE UNIVERSITY OF CALIFORNIA,

Defendants - Appellees

Appeal from the United States District Court for the Southern District of Texas, Houston

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ON PETITION FOR REHEARING AND REHEARING EN BANC

(Opinion 08/27/09, 5 Cir _____, _____, F.3d _____)

Before JOLLY, WIENER, and ELROD, Circuit Judges.

PER CURIAM:

(X) The petition for rehearing and rehearing en banc are out of time. The Court has allowed the filings of the late petition for rehearing and rehearing en banc. The Petition for Rehearing is DENIED and no member of this panel nor judge in regular active service on the court having requested that the court be polled on Rehearing En Banc, (FED. R. APP. P. and 5TH CIR. R. 35) the Petition for Rehearing En Banc is also DENIED.

( ) The petition for rehearing and rehearing en banc are out of time. The Court has allowed the filings of the late petition for rehearing and rehearing en banc. The Petition for Rehearing is DENIED and the court having been polled at the request of one of the members of the court and a majority of the judges who are in regular active service and not disqualified not having voted in favor, (FED. R. APP. P. and 5TH CIR. R. 35) the Petition for Rehearing En Banc is also DENIED.

( ) A member of the court in active service having requested a poll on the reconsideration of this cause en banc, and a majority of the judges in active service and not disqualified not having voted in favor, Rehearing En Banc is DENIED.

ENTERED FOR THE COURT:
S./ E. Grady Jolly
United States Circuit Judge

A-3. Text of Petition for Re-evaluation of the PSLRA as found within the Petition for Rehearing filed with the U.S. Court of Appeals for the Fifth Circuit :

Petition for Re-evaluation of the PSLRA

Statement of the Issues Meriting Rehearing

In an effort to be terribly brief the court overlooks the fact that the Complaint and case was not brought against the Dynegy Settlement. The apparent subject of "attack on settlement finality"resulted from Defendants' illegitimate transformation of subject and issues for court perceptions. The matters of class-representatives, here as Defendants, manipulative behaviors of fraud and malpractice, as are described , while occurring within that representation, create a violation of Federal Law and that is the subject of the case.

That law is the Private Securities Litigation Reform Act (PSLRA) which is neither addressed nor acknowledged and accorded in either the Texas District Court or this court's analysis. The law provisions, cited, under the law at PSLRA §78u-4(a)(2)(A) include that Defendant Regents (and their chosen Lead-Counsel) had a personal-responsibility to actually represent the class. Such "Representation" is well-known and accepted to require fairness, adequacy, and a surety not to defraud the represented by acceptance of any disparate consideration in settlement. The violation of that law is separable from the Dynegy Settlement as a cause-of-action.

That "fairness" obligation of representatives is essentially defined in PSLRA §78u-4(a)(4) that the entire plaintiff-class is, by law, to share-and-share-alike in any settlement consideration. Judicial Discretion to alter the settlement considerations, beyond legitimate costs and expenses, in order to benefit Lead-Plaintiff, is specifically denied by Act of Congress. While that alteration did occur within the Texas District Court's actions in the Dynegy Settlement, Petitioner's case is not made against the settlement, the Texas court, or Dynegy Corp. but instead against the class-representatives' personal-responsibility to see that an unequal-proportion settlement did not happen. The PSLRA law provisions are made specifically to govern class-representatives' behaviors.

Clearly, any analysis of the Petitioner's submissions within the time during and since that Texas District Court process of this case, as appealed, would discover the PSLRA law cited and then NOT found it Judicially Noticed in court rulings or opinions. The effect of general court failure to recognize the actual subject and issues of Federal Law violation overlooks the consequence of abandoning the law, disregards the courts' responsibilities to administer the law, and demolishes this Petitioner's case. It is for the courts to recognize that any case made to pursue representatives' violation of PSLRA law, within a settlement, would be subjected to the same defense twisting and distraction, as here. It is essential to justice and the PSLRA law that such cases be accorded a fundamental perception to see through the haze to the actual subject. That a conflict-of-interest within the actions of class-representatives exists between The Regents interests and the

interests of those they were to represent, is unmistakable in that bargain for the disparate benefit. That conflict-of-interest is precisely unfair representation. Without court recognition of the PSLRA law-provisions as conclusively show the existence of that "personal responsibility" by requiring personally-signed Sworn Certificate, no cause-of-action independent of the Dynegy Settlement appears to exist. Hence, the need for the "securities litigation reform" law created by Congress.

The quality of that unshared, disparate benefit ceded to The Regents has been overlooked by the court. The nomination-provision is not merely an ability to nominate but is modified by the words "will be", as, two of those nominees will be elected to Seats on the Dynegy Board of Directors. The provision is perpetual control over two Board Seats and the power and control gained is valuable.

Plaintiff releasing Dynegy et al. in settlement does not release class-representatives from the law violation(s) committed while conducting that settlement or prevent suit against these Defendants. The courts have wrongfully positioned themselves by overlooking the correct interpretation of the subject of the suit as is not a Dynegy Settlement issue and, thereby, created the circumstance of interference with Defendants' accountability for the law violation(s).

Statement of the Course of Proceedings

The 5th Circuit Appeal was determined on the briefs, as has every other court process of the case. Originally filed, in West Virginia for anticipated

Oral Argument before a jury, as a Federal Law violation case made specifically pertinent to class-representatives' behaviors, the case has suffered the distraction of the actual subject by defense initiatives to avoid address of the law violations and find shelter within court pronouncements within the Dynegy Settlement. The court presiding over that settlement chose to also be the forum for this Petitioner's law-violation case by acceptance of Defendants' argument of its continuing jurisdiction. That Texas District Court would not address the PSLRA law violation(s) and Dismissed Petitioner's case. That Texas District Court, by not accepting the PSLRA for acknowledgment or address, essentially determined that no cause-of-action separable from attack on the Dynegy Settlement exists. This court in its Affirmation of the District Court has drawn the same erroneous conclusions by not acknowledging or addressing the cited PSLRA provisions pertinent to the personal-responsibility of class-representatives, here as Defendants.

Statement of Necessary Facts to the Argument

Defendants' "illegitimate transformation" of Dynegy Settlement issues from object to subject occurred by an extension of Texas District Court jurisdiction without benefit of actual adherence to the law-cite (Kokkonen v. Guardian Life) governing "continuing jurisdiction". The law-cite requires that a specified breach of a settlement-agreement is necessary. No such specific breach of agreement by this Plaintiff occurred or was

submitted to the courts by Defendants' counsels. Even so, a law-violation case should not be commanded to a singular venue. The Defendants' behaviors occurred within that Dynegy Settlement and are analyzed objectively by Petitioner in address of the subject law-violation(s). The matter of Plaintiff's writings of the Dynegy Settlement being final exists throughout the case. Logically, no "attack on a settlement" would be made or could prevail in the presence of this Plaintiff's declaration of the settlement being completed and final. The request for Judicial Notice of those facts are also made and here made again. To be clear, both the "continuing jurisdiction" and "disruption of settlement-finality issues" as responded by Plaintiff and as have been misapprehended by the courts are Defendants' initiatives to distract the subject. The PSLRA law can not be avoided by the courts for dutiful interpretation and ,so, overlooked for this citizen's Right to Due Process of Law. The law must be recognized, interpreted, and upheld.

Argument and Authorities

"Judicial Notice" found in Plaintiff's writings to the courts and found in The Federal Rules of Evidence Rule 201(d) is mandatory. While Federal Rules of Evidence Rule 1101(a) describes that the rules apply to U.S. Courts of Appeals. The necessary and overwhelming evidence to support adjudicative fact(s) that this case describes breakage of the PSLRA law and is not a Dynegy Settlement matter are already before the court. The request is made and here made again for Judicial Notice of both

the pertinent law which prohibits the described Defendants' behaviors and such Notice that the Dynegy Settlement is not the subject of the case.

The court overlooks that a law violation must be compensable in consequence to those victimized by its breakage. The conflict-of-interest once entered into by Defendants defines that victimization of the other plaintiff-class-members. The court must have also overlooked that seeking compensation in redress for law violation is a cause-of-action and claim under Federal Rules of Civil Procedure 11(b)(2). Judicial Notice of the adjudicative fact of the existence of the cause-of-action by Rule 11 is also made and here made again.

The court overlooks that Defendants essentially admit gaining a consideration and advantage for Defendant Regents that other plaintiff-class-members did not receive. The court overlooks that that gain was conceived and made in such a way to purposefully prevent most class-members from either timely realization of the gain, itself, or that such gain is a conflict-of-interest issue within the recovery interests of the remaining class. The law is written precisely to prevent such abuse and to create a cause-of-action for compensation as a reform of commonplace untoward-practices.

Conclusion

The Dynegy Settlement and the original, presiding court didn't steal from me, these Defendants did. That theft occurred by deception in the crafting of that finalized settlement to provide financial

indemnity to Dynegy for its original fraud and provide extra benefit to The Regents in the settlement as an inducement for Lead-Plaintiff to settle. What was stolen was notional "representation" and the opportunity to recover the sustained-loss beyond the pittance-proportion, as was concealed to only later be discovered to be a result of Defendants' class-action-representation failure. The "later discovery", itself, was caused through direct manipulation by the limiting of access to the information due the class for consideration. Negotiation-for and acceptance-of that unshared settlement-consideration as admitted by Defendants is an absolute breach of the PSLRA law provisions, cited by Plaintiff.

Within a cause-of-action independent of the Dynegy Settlement , the Defendants' submission of a false claimant-pool-estimate as aided to mislead class expectations in recovery is a violation of Federal Rules of Civil Procedure Rule 11(b)(3) with a court sanction for violation found at Rule 11(c)(4). Petitioner is an advocate of that sanction by this court.

For this court to Rule the actual subject of the case, the law must be Judicially Noticed and, so, addressed for interpretation by the courts, one way or another.

A-4. Text of Petition for Recognition of the Case Actually Made as found within the Petition for Rehearing En Banc filed with the U.S. Court of Appeals for the Fifth Circuit :

Petition for Recognition of the Case Actually Made

Statement of the Issues Meriting En Banc Consideration

It is of exceptional importance and consequence that this court recognize that Rule 201(d) of the Federal Rules of Evidence has been overlooked in this court's August 27, 2009 Judgment of Affirmation. Rule 201(d) specifies Judicial Notice of adjudicative facts is mandatory on request by a party. Federal Rules of Evidence Rule 1101(a) specifies that the rules therein are applicable to U.S. Courts of Appeals. Petitioner maintains that both informational support for Judicial Notice and request for that Notice is made throughout Petitioner's submissions to both the Texas District Court and this Court of Appeals. The request is here made again.

Further, that Judicial Notice of the Private Securities Litigation Reform Act (PSLRA) provisions cited at §78u-4(a)(2), as incorporates §78u-4(a)(4), share "any settlement" consideration, remain unaddressed (and, so, the actual subject and issues of the case). A "judicially noticed fact" is defined at Rule 201(b). The elements seen as necessary for address within that mandatory Judicial Notice and court consideration include :

1. The PSLRA commands that fair and adequate representation by class-representatives, here as Appellees/Defendants be personally honored and that any settlement-considerations be shared equally among all plaintiff-class-members. The PSLRA coincidentally describes that it is beyond Judicial Discretion to permit settlement on terms other than share-and-share-alike except with regard to class-representatives' sustained costs or expenses ; and, so too, describes what that representative-personal-fairness approximately comprises within the intention of the law. The law-cite neutralizes Judicial Discretion of any permanent Federal Rules of Civil Procedure Rule 23 settlement-pronouncements (made by the Texas District Court presiding over the Dynegy Settlement) as to the "fairness and adequacy" of class-representation within the context of a PSLRA violation case. That "neutralization" is further supported by the fact that the PSLRA commandment to share-and-share-alike did not take-place.

Defendants admit negotiation for and acceptance of the disparate settlement-consideration in the form of power and control over the two Dynegy Board of Director's Seats. This court has overlooked in its *per curiam* opinion the specific language amplifying the nomination-provision ceded in the Dynegy Settlement as describes that two, of a short-list, of The Regents nominees "will be" elected onto the Board ; thus, a guarantee of ownership of the Seats is made. There is no time-limitation of that power ; and, so, two of The Regents favored individuals will sit on the Dynegy Corp. Board of Directors in perpetuity. Petitioner

previously calculated the 2005 nominal-Dollar-value of that ceded power and control for the courts as $339,000,000 (339 Million Dollars).

2. The actual subject and issues of the case do not seek to disrupt the finalized settlement of Dynegy Securities Litigation or Dynegy Corp., itself, would have been a named Defendant. The actual issues are related to behaviors of Defendants within the Dynegy Settlement as objects and the Dynegy Settlement is not the subject cause-of-action of the suit. The actual issues describe fraud and malpractice behaviors creating those Defendants' violation(s) of the PSLRA law provisions, as created by Congress to be pertinent to control of class-representation. Federal law violation is the true subject of the case.

3. The actual subject and issues of Petitioner's case were distracted by Defendants to make a defense as if the settlement and settlement finality were under attack. For the purpose of Defendants' defense, "continuing jurisdiction" of the original Texas District Court presiding the Dynegy Settlement was invoked to this case contrary to the cited court decision (Kokkonen v. Guardian Life, 511 U.S. 375 at pages 377 and 381) governing such continuing jurisdiction as is reliant on a breach of settlement-provisions and where no specified breach occurred. That Texas Court accepted the change of subject proffered by Defendants and also decided to accept jurisdiction even though that jurisdiction was not actually supported by statute law or decided-case-law.

4. As should be recognizable within Petitioner's

submissions, another conflict-of-interest may have been engaged when that same Texas District Court decided to make determinations to this case rather than return the case to West Virginia District Court. The "fairness" issue of Defendants' PSLRA personal-responsibility violation could not reasonably be Ruled by that Texas District Court after its pronouncement of Rule 23 "fairness" of the settlement because that court had, itself, disregarded its role within the PSLRA commandment that all settlement-considerations be shared equally, as cited at §78u-4(a)(4).

Statement of the Course of Proceedings

The 5th Circuit Appeal was determined on the briefs, as has every other court process of the case. Originally filed, in West Virginia for anticipated Oral Argument before a jury, as a law-violation-case made specifically pertinent to class-representatives' behaviors, the case has suffered the distraction of the actual subject by defense initiatives to avoid address of the law violations and find shelter within court pronouncements within the Dynegy Settlement. The court presiding over that settlement chose to be the forum for this Petitioner's law-violation case by acceptance of Defendants' argument of its continuing jurisdiction. That Texas District Court would not address the PSLRA law violation(s) and Dismissed Petitioner's case. That Texas District Court, by not accepting the PSLRA for acknowledgment or address, essentially determined that no cause-of-action separable from attack on the Dynegy

Settlement exists. This court in its Affirmation of the District Court has drawn the same erroneous conclusions by not acknowledging or addressing the cited PSLRA provisions pertinent to the personal-responsibility of class-representatives.

Statement of Necessary Facts to the Argument

The Complaint and case was never intended to be brought against the Dynegy Settlement. Defense counsels interjected the "finality" of settlement as an issue. Previous court determinations of defense arguments have caused the making of Petitioner's response to those arguments ; but , that finalized settlement is not the true subject of the case.

The case is made to address only the pertinent law-violations of Defendants in their service to the class as representatives. The Private Securities Litigation Reform Act (PSLRA) precisely describes the behaviors Petitioner references as fraud and malpractice as violation(s) of the law provisions (cited) as pertinent to class-representation.

To date, the courts making determinations to this case have overlooked any recognition or address of those cited law-provisions commanding the representatives' knowing compliance with "fairness" and "adequacy" to resist the temptation (of unequal treatment imposed on the plaintiff-class) ; and , so , the courts can not find a lawful-basis to proceed the case separate from the Dynegy Settlement. The circumstance of an absence of court recognition of the full-application of the PSLRA Law must change.

Conclusion

The success of Petitioner's case is wholly dependent on court recognition and enforcement of Federal Law Provisions as also provided the basis for U.S. District Court applicable civil-cause-of-action under Federal Rules of Civil Procedure Rule 11(b)(2). The cause-of-action was first regarded by the West Virginia Federal Magistrate Judge as, "... may constitute a claim that the Regents had a conflict of interest with the rest of the class".

It is not a great "leap of imagination" to recognize the PSLRA Sworn Certificate Requirements bind the Defendants to personal-responsibility to conduct themselves fairly. Likewise, it is no "leap" to conclude when PSLRA "share and share alike" was abandoned in favor of a special consideration for Lead-Plaintiff, Regents, to power and control within Dynegy Corp., the lack of that personal-responsibility to resist temptation became civilly accountable, specifically against class-representatives, as a law violation.

Irrespective of what a particular court will allow class-representatives to negotiate and accept in settlement, the significant issue remains within the personal-responsibility attending those Sworn Certificates of the PSLRA, as command behavior in representation to be fair and adequate. The law describes that "share and share alike" is fair. In a context of representatives bargaining for advantages separate from what the represented would receive, "share and share alike" is abandoned along with notional "representation" of

the class. What Dependants allowed to happen to "class-representation" can not be forgiven. These Defendants must be held to account for that abandoned personal-responsibility under the PSLRA law precisely because they necessarily knew better and willingly accepted the temptation.

In this Petitioner's case, neither an action against the Texas District Court nor Dynegy for errors made is made here because those PSLRA provisions cited are truly pertinent and applicable to only that representative-responsibility to behave within the confines of reformed, securities-litigation law.

With Judicial Notice of the PSLRA law, the court should reconsider the Federal Rules of Civil Procedure Rule 11(c)(1) sanction for Rule 11(b)(3) violation by Defendants' false claimant-pool-estimate that skewed and misled recovered-amounts as a personal-responsibility issue apart from the Dynegy Settlement.

Defendants' necessarily knew the law applied to them and it only remains for the courts to recognize an obligation to enforce the provisions. In the absence of a particular court's willingness to enforce the law, other courts must accommodate to fill the gap or risk loss of the law and the spirit of corruption-reform.

A-5. Copy of Fifth Circuit Court Clerk's notice to Texas District Court Clerk indicating issuing mandate (to levy costs against Plaintiff) and that the electronic copy of the record in three (3) volumes was "recycled" :

United States Court of Appeals
Fifth Circuit
Office of the Clerk

CHARLES R. FULBRUGE III TEL. 504-310-7700
CLERK 600 S. Maestri Place
New Orleans, LA 70130

October 08, 2009

Mr. David J. Bradley
Southern District of Texas, Houston
United States District Court
515 Rusk Avenue
Room 5300
Houston, TX 77002

No. 09-20106, Charles Birks v. Keith Park, et al
USDC No. 4:08-CV-2702

Enclosed, for the Southern District of Texas, Houston only, is a copy of the judgment issued as the mandate.

Enclosed, for the Southern District of Texas, Houston only, is a copy of the court's opinion.

The electronic copy of the record (3 vols.) has been recycled.

CHARLES R. FULBRUGE III, Clerk

By: S./ Claudia N. Farrington
Claudia N. Farrington, Deputy Clerk
504-310-7706

cc : (letter only)
Honorable Sim T. Lake, III
Mr. Charles W Birks
Ms. Tracy Dodds Larson
Ms. Kathy Dawn Patrick

P.S. to Judge Lake : A copy of the opinion was sent to your office via email the day it was filed.